

**MENTARI SEKITAR SDN BHD v.
HERITAGE PROPERTY SDN BHD**

COURT OF APPEAL, PUTRAJAYA

LIM YEE LAN JCA

VARGHESE GEORGE JCA

IDRUS HARUN JCA

[CIVIL APPEAL NO: W-02(NCVC)(W)-1845-10-2014]

22 JANUARY 2016

CONTRACT: *Termination – Validity – Sale and purchase agreement – Termination upon failure to pay balance purchase price within stipulated period – Whether time intended to be essence of agreement – Allegation of oral collateral agreement extending time – Whether proven – Whether oral collateral agreement mentioned in recitals of agreement – Whether agreement validly terminated*

CONTRACT: *Terms – Express terms – ‘time shall be of essence’ – Allegation of oral collateral agreement extending time – Whether oral collateral agreement mentioned in recitals of agreement – Whether an attempt to introduce new terms to agreement – Whether directly contradicted various express terms of agreement – Whether amounted to rewriting agreement – Whether prohibited under ss. 91 and 92 of Evidence Act 1950 – Contracts Act 1950, s. 91*

CONTRACT: *Waiver – Conduct – Time was of essence of agreement – Whether allowing extensions of time and 19 days of inactivity amounted to waiver – Whether silence amounted to waiver – Whether time ceased to be of essence of agreement*

CIVIL PROCEDURE: *Appeal – New point raised on appeal – Point never pleaded in defence and counterclaim and not part of ‘issues to be tried’ – Whether an attempt to formulate alternative line of defence – Whether question of law – Whether new point fell within exceptions – Balance of justice – Whether in favour of allowing new point raised at appellate stage*

By a sale and purchase agreement dated 24 February 2011 (‘SPA’), the plaintiff/respondent, the registered owner of a parcel of land, agreed to sell the land to the defendant/appellant. The appellant paid a deposit equivalent to 10% of the purchase price of the land. Pursuant to the SPA, the balance purchase price was to be paid within three months plus an additional three months from the unconditional date or date of the agreement. It was a term of the agreement that ‘time shall be of essence’. However, the appellant failed to make the payment of the balance purchase price within the period stipulated in the agreement. The respondent gave four extensions of time for the appellant to make the payment of the balance purchase price, each time stating that ‘time shall be of essence’. When the appellant still failed to make the payment of the balance purchase price, the respondent terminated the SPA. However, the appellant refused to remove the private caveat that it had lodged on the land and to return the land title deed and other relevant

A documents to the respondent. The respondent thus claimed, *inter alia*, for
B declarations that the SPA was rightly, validly and lawfully terminated and
C that the deposit was rightfully and lawfully forfeited by the respondent. In
D its defence, the appellant raised the issue of an alleged oral collateral contract
E that the parties had agreed that the time for payment of the balance purchase
F price would be extended pending the construction and completion of a
G highway and access roads to the land together with the provision of the
H related basic infrastructure as stated in Preamble F and G of the SPA. The
I appellant pleaded that time was never the essence of the agreement. The trial
judge decided that the appellant had failed to prove the existence of the
alleged oral collateral contract extending the time for payment of the balance
purchase price and had therefore breached the SPA in not making the
payment of the balance purchase price. The termination of the SPA by the
respondent was held to be valid and lawful. Hence, the appeal by the
appellant. The appellant, in its submission, sought to raise a new point that
time became no longer of the essence because the respondent had allowed
several extensions of time and had allowed 19 days to pass without doing
anything before purporting to terminate or rescind the SPA. The appellant
contended that this had allowed for time to be considered at large under
s. 56(1) of the Contracts Act 1950 and rendered the termination invalid. The
respondent filed a cross appeal contending that the decision of the trial judge
ought to be varied to the extent that the general damages claimed against the
appellant be allowed. The issue for the court's determination was whether,
as a matter of fact, time was never intended to be the essence of the SPA,
notwithstanding the plain terms of the said agreement.

**Held (dismissing appellant's appeal with costs; dismissing respondent's
cross appeal)**

Per Idrus Harun JCA delivering the judgment of the court:

(1) Where the terms of a contract have been reduced to writing and have
been proved according to s. 91, *ie*, the contract is proved by the
document itself, it is not open to the appellant to seek to introduce, and
for the court to admit, any evidence of any oral agreement or statement
that would, *inter alia*, add new terms to it. The offers to purchase signed
during the first meeting made no mention of the highway, access road
or connectivity to utilities as being condition precedent to payment of
the full purchase price. Both Preamble F and G of the SPA were plain
in their terms in that nowhere did the recitals make any mention about
the alleged oral collateral agreement. Hence, the appellant was
obviously seeking to rewrite the SPA between the parties to add in a new
clause or term which contradicted the various express terms of the SPA.
This was prohibited by ss. 91 and 92 of the Evidence Act 1950.
(paras 13, 14, 17 & 18)

- (2) The opportune time to bring up the alleged oral collateral contract would be at the point of time when the respondent was pressing for payment of the balance purchase price. The fact that it was never raised at all until the defence and counterclaim were filed could only lead to the irresistible conclusion that there was in fact never any such oral collateral contract. (para 20) A
- (3) The alleged oral collateral contract also directly contradicted various express terms of the SPA. If the issue was indeed discussed at the first meeting, and being such an important matter which pertained to payment of about RM20 million, it would have been inserted in the very first draft of the SPA prepared by DW3 or he, as a competent and experienced solicitor, would have captured it in some documents somewhere, even if it was not reduced into the SPA. This, as admitted by DW3, was not done. Further, if there was indeed the alleged oral contract, the appellant's letter dated 23 September 2011 seeking an extension of time on the payment of the balance purchase price would not be necessary. (paras 24, 27 & 28) B
- (4) The new point raised by the appellant was never pleaded in the defence and counterclaim. Neither was it raised in the appellant's submission and reply submission during the full trial in the court of first instance. The new point was also not part of the 'issues to be tried'. Therefore, the appellant was clearly attempting to formulate an alternative line of defence which was not pleaded. It was not a question of law but one of fact and was not considered by the trial judge. (paras 32-34) C
- (5) It is a trite and established principle that the appellate court tends to lean against allowing issues not pleaded. In order to justify the new point to be raised on appeal, it must be shown that the new point comes within the established exceptions *ie*, illegality and jurisdiction. However, the appellant had not shown that the new point fell within any of the established exceptions. In the circumstances, the balance of justice laid in favour of the respondent in not allowing the new point to be raised at the appellate stage. (paras 35 & 37) D
- (6) Time may cease to be of the essence if there was a 'waiver' which may arise 'by express conduct and words and even impliedly by continuing negotiations'. There was not a single shred of evidence of what had happened during the 19 days that had passed. The 'waiver' could not arise merely by doing nothing for the 19 days as alleged by the appellant. Mere silence by itself does not at law amount to a waiver of a party's right to insist that time be of the essence. (paras 38 & 39) E
- (7) The respondent was not entitled to any loss and damages as no evidence was led in the High Court to prove the actual quantum of damages (if any) suffered by the respondent as a result of the appellant's failure to F
- G
- H
- I

- A remove the private caveat and return the land title and other relevant documents to the respondent. The respondent's cross appeal was thus dismissed. (para 43)

Bahasa Malaysia Headnotes

- B Melalui perjanjian jual beli bertarikh 24 Februari 2011 ('PJB'), plaintiff/
responden, pemilik berdaftar sebidang tanah, bersetuju untuk menjual tanah
kepada defendan/perayu. Perayu membayar deposit bersamaan dengan 10%
harga belian tanah tersebut. Selaras dengan PJB, baki harga belian patut
dibayar dalam masa tiga bulan dengan tambahan tiga bulan dari tarikh tidak
bersyarat atau tarikh perjanjian. Adalah syarat perjanjian yang 'masa menjadi
C intipati'. Walau bagaimanapun, perayu gagal membuat bayaran baki harga
belian dalam tempoh yang ditetapkan dalam perjanjian. Responden memberi
empat lanjutan masa bagi perayu membuat bayaran baki harga belian, setiap
kali menyatakan 'masa menjadi intipati'. Apabila perayu gagal membayar
baki harga belian, responden menamatkan PJB. Walau bagaimanapun,
D perayu enggan membatalkan kaveat persendirian yang dimasukkan atas tanah
tersebut dan memulangkan geran tanah dan dokumen lain yang relevan
kepada responden. Responden menuntut, antara lain, deklarasi bahawa PJB
telah ditamatkan dengan betul, sah dan menurut undang-undang dan bahawa
deposit telah dilucutkan dengan sah dan menurut undang-undang oleh
E responden. Dalam pembelaannya, perayu membangkitkan isu suatu kontrak
kolateral secara lisan yang menyatakan bahawa pihak-pihak bersetuju
bahawa masa untuk pembayaran baki harga belian akan dilanjutkan
sementara menunggu pembinaan dan penyiapan lebuh raya dan jalan masuk
ke tanah bersama dengan peruntukan berkaitan infrastruktur asas seperti
F dinyatakan dalam pendahuluan F dan G PJB tersebut. Perayu memplidkan
masa tidak pernah menjadi intipati perjanjian. Hakim bicara memutuskan
perayu gagal membuktikan kewujudan kontrak kolateral secara lisan yang
dikatakan melanjutkan masa untuk pembayaran baki harga belian dan
dengan itu, melanggar PJB apabila tidak membayar baki harga belian.
G Penamatan PJB oleh responden diputuskan sah dan menurut undang-undang.
Oleh itu, rayuan perayu. Perayu, dalam penghujahannya, membangkitkan
perkara baru iaitu masa bukan lagi menjadi intipati kerana responden telah
membenarkan beberapa lanjutan masa dan telah membenarkan 19 hari
berlalu tanpa berbuat apa-apa sebelum menamatkan atau membatalkan PJB.
H Perayu menghujahkan bahawa ini telah menjadikan masa tidak terhad di
bawah s. 56(1) Akta Kontrak 1950 dan menjadikan penamatan tersebut tidak
sah. Responden memfailkan rayuan balas menghujahkan bahawa keputusan
hakim bicara patut diubah setakat ganti rugi am yang dituntut terhadap
perayu dibenarkan. Isu untuk penentuan mahkamah adalah sama ada sebagai
I perkara fakta, masa tidak pernah diniatkan menjadi intipati perjanjian, walau
apa pun syarat jelas perjanjian tersebut.

Diputuskan (menolak rayuan perayu dengan kos; menolak rayuan balas responden)

Oleh Idrus Harun HMR menyampaikan penghakiman mahkamah:

- (1) Apabila syarat-syarat dalam kontrak adalah bertulis dan dibuktikan menurut s. 91, iaitu, kontrak tersebut dibuktikan oleh dokumen itu sendiri, tidak terbuka kepada perayu untuk memperkenalkan, dan untuk mahkamah akui, apa-apa bukti atau apa-apa perjanjian lisan atau pernyataan yang akan, antara lain, menambah syarat baru kepadanya. Tawaran untuk membeli ditandatangani semasa mesyuarat pertama dan tidak menyebut tentang lebuhraya, jalan masuk atau penyambungan kepada utiliti menjadi syarat terdahulu kepada bayaran untuk harga penuh belian. Kedua-dua pendahuluan F dan G PJB adalah jelas dalam syaratnya dan tiada di mana-mana disebut tentang kontrak kolateral secara lisan yang dikatakan. Oleh itu, perayu dengan jelas mencuba untuk menulis semula PJB antara pihak-pihak untuk memasukkan klausa atau syarat baru yang bertentangan dengan syarat nyata PJB. Ini adalah dilarang oleh ss. 91. dan 92 Akta Keterangan 1950. A
B
C
D
- (2) Masa yang sesuai untuk membangkitkan kontrak kolateral lisan yang dikatakan adalah pada masa responden menekan untuk bayaran baki harga belian. Fakta bahawa ia tidak pernah dibangkitkan langsung hingga pembelaan dan tuntutan balas difailkan hanya menjurus kepada kesimpulan bahawa tidak pernah ada sebarang kontrak kolateral secara lisan. E
- (3) Kontrak kolateral lisan yang dikatakan juga jelas bertentangan dengan syarat nyata PJB. Jika isu betul telah dibincangkan dalam mesyuarat pertama, dan menjadi perkara yang sangat penting yang berkaitan pembayaran lebih kurang RM20 juta, ia sepatutnya dimasukkan ke dalam draf pertama PJB yang disediakan oleh DW3 atau dia, sebagai seorang peguam yang kompeten dan berpengalaman, akan mencatatnya dalam suatu dokumen di suatu tempat. Ini diakui oleh DW3, tidak dibuat. Sekiranya betul ada kontrak lisan yang dikatakan, surat perayu bertarikh 23 September 2011 meminta lanjutan masa bayaran baki harga belian tidak akan diperlukan. F
G
- (4) Perkara baru yang dibangkitkan perayu tidak pernah diplidkan dalam pembelaan dan tuntutan balas, ia juga tidak pernah dibangkitkan dalam hujahan perayu dan hujahan balas ketika perbicaraan penuh di mahkamah. Perkara baru itu juga bukan sebahagian daripada 'isu yang dibicarakan'. Oleh itu, perayu jelas cuba untuk merancang pembelaan alternatif yang tidak diplidkan. Ia bukan soalan undang-undang tetapi suatu fakta dan tidak dipertimbangkan oleh hakim bicara. H
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- A (5) Adalah prinsip matan dan tersedia bahawa mahkamah rayuan lebih cenderung untuk tidak membenarkan isu-isu yang tidak diplidkan. Untuk mewajarkan perkara baru dibangkitkan dalam rayuan, mestilah ditunjukkan bahawa perkara baru tersebut adalah dalam pengecualian yang tersedia, iaitu, ketidaksahan dan bidang kuasa. Walau bagaimanapun, perayu tidak menunjukkan bahawa perkara baru tersebut terangkum di bawah mana-mana pengecualian tersedia. Dalam keadaan ini, imbalan keadilan memihak kepada responden dalam tidak membenarkan perkara baru dibangkitkan di peringkat rayuan.
- B
- C (6) Masa mungkin tidak menjadi intipati jika ada 'pengecualian' yang timbul dari tindakan dan kata-kata jelas atau tersirat secara rundingan berterusan. Tiada secebis pun bukti tentang apa telah terjadi sepanjang 19 hari berlalu. 'Pengecualian' tidak boleh timbul hanya dengan tidak berbuat apa-apa selama 19 hari seperti dikatakan oleh perayu. Berdiam diri sahaja tidak dengan sendirinya dari segi undang-undang terjumlah kepada pengecualian hak pihak-pihak untuk mendesak bahawa masa adalah intipati.
- D
- E (7) Responden tidak berhak terhadap apa-apa kerugian atau ganti rugi kerana tiada bukti ditunjukkan di Mahkamah Tinggi untuk membuktikan kuantum kerugian (jika ada) dialami responden atas tindakan perayu yang gagal mengalihkan kaveat persendirian dan memulangkan geran tanah serta dokumen relevan kepada responden. Rayuan balas responden dengan itu ditolak.

Case(s) referred to:

- F *Aik Ming (M) Sdn Bhd & 8 Ors v. Chang Ching Chuen & 3 Ors & Another Case* [1995] 3 CLJ 639 CA (*refd*)
Araprop Development Sdn Bhd v. Leong Chee Kong & Anor [2008] 1 CLJ 135 CA (*refd*)
Browne v. Dunn (1893) 6 R 67 HL (*refd*)
Hadmor Productions Ltd v. Hamilton [1983] 1 AC 191 (*refd*)
HG Warren v. Tay Say Geok & Ors [1964] 1 LNS 46 PC (*refd*)
- G *Hock Huat Iron Foundry v. Naga Tembaga Sdn Bhd* [1999] 1 CLJ 89 CA (*refd*)
Invescor Sdn Bhd v. Sobena Maju Sdn Bhd [2008] 2 CLJ 561 CA (*refd*)
Karuppiah v. Petaling Garden Co Sdn Bhd [1972] 1 LNS 51 FC (*refd*)
Keng Huat Film Co Sdn Bhd v. Makhanlal (Properties) Pte Ltd [1983] 2 CLJ 187; [1983] CLJ (Rep) 186 FC (*refd*)
Koperasi Mahadaya Bhd v. Koperasi Polis Diraja Malaysia Bhd & Anor And Another Appeal [2012] 1 CLJ 724 CA (*refd*)
- H *Lee Ah Chor v. Southern Bank Bhd* [1991] 1 CLJ 667; [1991] CLJ 1 (Rep) 239 SC (*refd*)
Linggi Plantations Ltd v. Jagatheesan [1971] 1 LNS 66 PC (*refd*)
Luggage Distributors (M) Sdn Bhd v. Tan Hor Teng @ Tan Tien Chi & Anor [1995] 2 CLJ 713 CA (*refd*)
Morello Sdn Bhd v. Jaques (International) Sdn Bhd [1995] 2 CLJ 23 FC (*refd*)
- I *Osaka Resources Sdn Bhd & Ors v. Foo Holdings Sdn Bhd* [2013] 1 LNS 984 CA (*refd*)
Plenitude Holdings Sdn Bhd v. Tan Sri Khoo Teck Puat & Anor [1992] 4 CLJ 1882; [1992] 3 CLJ (Rep) 281 HC (*refd*)

Song Lian Chye & Ors v. Tai Kian Cheong [1983] 2 CLJ 128; [1983] CLJ (Rep) 375 FC (*refd*) A

Subramanyah AJ Karupiah v. Bank Negara Malaysia [2011] 2 CLJ 178 CA (*refd*)

Tan Sri Khoo Teck Puat & Anor v. Plenitude Holdings Sdn Bhd [1993] 2 CLJ 146 SC (*refd*)

Tan Tek Seng @ Tan Chee Meng v. Suruhanjaya Perkhidmatan Pendidikan & Anor [1996] 2 CLJ 771 CA (*refd*) B

Tindok Besar Estate Sdn Bhd v. Tinjar Co [1979] 1 LNS 119 FC (*refd*)

Veronica Lee Ha Ling & Ors v. Maxisegar Sdn Bhd [2009] 6 CLJ 232 FC (*refd*)

Legislation referred to:

Contracts Act 1950, s. 56(1)

Evidence Act 1950, ss. 91, 92 C

Other source(s) referred to:

Dato' Seri Visu Sinnadurai, *Law of Contract*, 4th edn, LexisNexis, 2011, vol 2, p 882

For the appellant - Wong Kim Fatt (Maurice Ernest Scully, Wong Boon Chong, Wong Shiuann Yih with him); M/s M Scully D

For the respondent - Michael Teo (Lim Fung Yin with him); M/s Lim Fung Yin & Co

[*Appeal from High Court, Kuala Lumpur; Civil Suit No: 22NCVC-1500-12-2012 (affirmed)*]

Reported by S Barathi E

JUDGMENT

Idrus Harun JCA:

Introduction

[1] This appeal is related to Civil Appeal No. W-02(NCVC)(W)-1846-10-2014 in which Mentari Sekitar Sdn Bhd is also the appellant. However the respondents are two different companies which are related. At the outset, it must be observed that both appeals involve similar facts and issues with the appellant and the respondents seeking the same relief in their respective claim and counterclaim save differences such as the respective purchase price and the description of the subject land involved. That being the case, learned counsel for both parties had agreed to proceed with the present appeal only and that the decision in this appeal would bind the other appeal. The appeal is directed against the decision of the learned trial judge in allowing the respondent's claim against the appellant. The respondent has also filed a cross-appeal seeking to vary part of the said decision. F G H

Summary Of Material Facts

[2] The respondent, is the vendor and registered owner of a parcel of land situated at Pekan Klebang, Malacca. By a sale and purchase agreement dated 24 February 2011, the respondent agreed to sell the land to the appellant for I

A the purchase price of RM9,634,517.86. The appellant paid a deposit in the sum of RM963,451.79 which was equivalent to 10% of the purchase price of the land pursuant to the sale and purchase agreement.

[3] Under the sale and purchase agreement, the appellant was required to pay the balance purchase price within three months plus additional three months from the unconditional date or date of the agreement. As events turned out however, the appellant failed to make payment of the balance purchase price within the period stipulated in the agreement. The respondent gave four extensions of time for the appellant to make the payment of the balance purchase price each time stating that “time shall be of the essence”.
B In fact, the sale and purchase agreement stipulated that “time shall be of the essence of this agreement”. Thereafter, when the appellant still failed to make the payment of the balance purchase price, the respondent terminated the sale and purchase agreement in accordance with the terms thereof.
C However, the appellant refused to remove the private caveat it had lodged on the land and to return the land title deed and other relevant documents to the respondent.
D

[4] The respondent in their claim sought, *inter alia*:

- (a) a declaration that the sale and purchase agreement was rightly, validly and lawfully terminated by the respondent;
E
- (b) a declaration that the deposit in the sum of RM963,421.79 was rightfully and lawfully forfeited by the respondent pursuant to cl. 13.2 of the sale and purchase agreement;
- (c) a declaration that the power of attorney, transfer form A, letter for undertaking to refund, statutory declaration for non winding-up executed by the respondent in the sale and purchase transaction were of no legal effect and unenforceable;
F
- (d) an order for return and delivery of the sale and purchase documents by Messrs Chris Koh & Chiew to the respondent;
G
- (e) damages to be assessed; and
- (f) interest, costs and such further or other relief as the court deemed fit and proper.

[5] It is noteworthy that the second to fifth defendants were partners of a law firm Messrs Chris Koh & Chew. The firm was appointed as the appellant’s solicitors for the sale and purchase transactions of the land. However, the claim against the second to fifth defendants were struck out as the respondent and the second to fifth defendants had agreed to resolve the matter amicably and the claims against the latter had been withdrawn by the former.
H
I

Defence And Counterclaim

[6] The appellant had filed defence and counterclaim. In essence, the appellant in its defence raised the issue of an alleged oral collateral contract made between one Dato' Chen Chun Kong (DW1) of the appellant and one Dato' Vincent Leaw Seng Hai (PW1) of the respondent alleging that the parties had agreed that the time for payment of the balance purchase price would be extended pending the construction and completion of a highway and access roads to the land together with the provision of the related basic infrastructure comprising the main excess points for electricity, water, sewerage and telecommunications before the expiry of one year from 24 February 2011 as stated in Preamble F and G respectively of the sale and purchase agreement. The appellant therefore pleaded that notwithstanding the terms in the sale and purchase agreement, time was never the essence of the agreement and instead the time for completion and payment of the balance purchase price remained at large. The appellant's counterclaim sought the following relief:

- (a) a declaration that the sale and purchase agreement was unlawfully terminated by the respondent;
- (b) a declaration that the forfeiture of the deposit sum was unlawful;
- (c) an order for the refund of the deposit sums;
- (d) general damages; and
- (e) interest, costs and such further or other relief as the court deemed fit and proper.

The High Court's Decision

[7] The learned trial judge decided that, on the evidence, the appellant had failed to prove the existence of the alleged oral collateral contract extending the time for payment of the balance purchase price until after the completion of the highway and access road to the subject property together with the provision of the relevant basic infrastructure mentioned in Preamble F and G of the sale and purchase agreement. The appellant therefore had breached the sale and purchase agreement in not making the payment of the balance purchase price and the termination of the sale and purchase agreement by the respondent was valid and lawful. The learned trial judge therefore entered judgment for the respondent as prayed in paras. 20(a), (b), (c) and (d) of the amended statement of claim with costs but disallowed the respondent's claim for general damages.

A The Appeal

[8] The appellant raised several grounds of appeal before this court. In our view however, these grounds clearly boiled down to one principal question. That was, whether as a matter of fact time was never intended to be the essence of the sale and purchase agreement, notwithstanding the plain terms of the said agreement. This was the natural question that flowed from the appellant's contention that there existed an oral collateral contract between the parties that the time to pay the balance of purchase price would be extended until the highway and access road mentioned in Preamble F and G of the sale and purchase agreement was constructed.

[9] The respondent had also filed a cross-appeal contending that the decision of the learned trial judge ought to be varied to the extent that the general damages in the sum of RM63,903 claimed by the respondent against the appellant be allowed.

D Our Decision

[10] In this action the appellant, in its pleadings, namely, the defence and counterclaim, did raise the issue of an alleged oral collateral contract purportedly reached between the parties' respective managing directors namely PW1 and DW1. It is significant to note however that the appellant did not provide any particulars relating to the date when and the place where this issue was discussed, agreed upon and made by both parties. The defence and counterclaim merely states that this oral agreement was at all material times made and agreed to between both PW1 and DW1. It is little wonder therefore that the learned trial Judge in fact found that the appellant failed to name the time, date and place where the oral contract was made and remarked that the court was left to conjecture.

[11] It is quite clear from the evidence that there were indeed two meetings prior to the execution of the sale and purchase agreement. The first meeting took place on 31 January 2011 when the appellant made the offer in writing to purchase the land by way of the offers to purchase which was executed on the same date, while the second meeting was on 23 February 2011 to finalise the terms of the sale and purchase agreement. From DW1's witness statement, it would appear that DW1 alleged that the oral collateral meeting was made during the second meeting when PW1 orally informed him not to worry about the completion date for payment of the balance purchase price (since the said condition and representation was no longer made a condition precedent) which would be negotiated and extended if the respondent had not commenced on the construction to fulfil Preamble F and G of the sale and purchase agreement. It is a pertinent point to note that DW1 in his witness statement said that the date for payment of the balance purchase price would be negotiated whereas the appellant's pleaded case is that time for payment

of the balance purchase price would be extended. Therefore, based on DW1's own testimony, there was in fact, no such oral agreement as pleaded, that time for the payment of the balance purchase price would be extended if the infrastructures and utilities were not completed, but rather, that the parties would sit down and renegotiate.

[12] In any event, DW1 during cross-examination had indeed admitted that there was no such discussion on 23 February 2011 that the balance purchase price need not be paid if the infrastructures and utilities were not completed within the one year period. There was also tacit admission by DW1 during cross-examination that there was no such discussion during the first meeting either. The witness statement of DW3, Chris Koh Swee Kiat who was the appellant's solicitor did indeed state that there was hardly any negotiation during the first meeting because PW1 insisted on the earnest deposit to be paid before Chinese New Year.

[13] It is also to be observed that the offers to purchase signed on 31 January 2011 during the first meeting made no mention of the highway, access road or connectivity to utilities as being condition precedent to payment of the full purchase price. DW3 in his witness statement did also state that this condition was not in the offers to purchase and was supposed to be in the sale and purchase agreements, but the respondent objected and as a compromise, the matter was inserted into Preamble F and G. In our opinion therefore, with DW3's own admission of the respondent's objection to such incorporation into the sale and purchase agreement and of the parties' compromise to put the same into Preamble F and G, the so-called oral collateral contract, if at all, had been superseded by the subsequent concluded terms of the sale and purchase agreement.

[14] We pause here to observe that both Preamble F and G are plain in their terms. Preamble F merely states that the main highway and the access roads will be completed and open to public usage on or before the expiry of one year from the date of the sale and purchase agreement. Preamble G is merely a statement that the purchaser (the appellant) will be able to tap and connect to its usage for the purpose of the property, on or before the expiry of one year from the date of the sale and purchase agreement. Nowhere do these recitals make any mention about the alleged oral collateral agreement to extend the time for payment of the balance purchase price (required to be made within three plus additional three months from date of the sale and purchase agreement) in the event these infrastructures and utilities were not completed on or before the expiry of one year from the date of the sale and purchase agreement. The contents of these preamble must be true as cl. 23.1 (ix) of the sale and purchase agreement declares that the matters set out in the preamble are correct and true. This very clear declaration would in our view, operate to preclude any oral evidence or statement from being admitted for the purpose of contradicting or varying it.

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- A [15] Hence, the genesis and logic of the parol evidence rule as encapsulated in ss. 91 and 92 of the Evidence Act 1950 which read:

Evidence of terms of contracts, grants and other dispositions of property reduced to form of document

- B 91. When the terms of a contract or of a grant or of any other disposition of property have been reduced by or by consent of the parties to the form of a document, and in all cases in which any matter is required by law to be reduced to the form of a document, no evidence shall be given in proof of the terms of the contract, grant or other disposition of property or of the matter except the document itself, or secondary evidence of its contents in cases in which secondary evidence is admissible under the provisions hereinbefore contained.

C Exclusion of evidence of oral agreement

- D 92. When the terms of any such contract, grant or other disposition of property, or any matter required by law to be reduced to the form of a document, have been proved according to section 91, no evidence of any oral agreement or statement shall be admitted as between the parties to any such instrument or their representatives in interest for the purpose of contradicting, varying, adding to, or subtracting from its terms:

Provided that:

- E (a) any fact may be proved which would invalidate any document or which would entitle any person to any decree or order relating thereto, such as fraud, intimidation, illegality, want of due execution, want of capacity in any contracting party, the fact that it is wrongly dated, want or failure of consideration, or mistake in fact or law;
- F (b) the existence of any separate oral agreement, as to any matter on which a document is silent and which is not inconsistent with its terms, may be proved, and in considering whether or not this proviso applies, the court shall have regard to the degree of formality of the document;
- G (c) the existence of any separate oral agreement constituting a condition precedent to the attaching of any obligation under any such contract, grant or disposition of property, may be proved;
- H (d) the existence of any distinct subsequent oral agreement, to rescind or modify any such contract, grant or disposition of property, may be proved except in cases in which the contract, grant or disposition of property is by law required to be in writing, or has been registered according to the law in force for the time being as to the registration of documents;
- I (e) any usage or custom by which incidents not expressly mentioned in any contract are usually annexed to contracts of that description may be proved if the annexing of any such incident would not be repugnant to or inconsistent with the express terms of the contract; and

(f) any fact may be proved which shows in what manner the language of a document is related to existing facts.

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[16] In the Federal Courts case of *Keng Huat Film Co Sdn Bhd v. Makhanlal (Properties) Pte Ltd* [1983] 2 CLJ 187; [1983] CLJ (Rep) 186; [1984] 1 MLJ 243, Mohamed Azmi F J stated:

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It is a well-established rule that the court cannot construe a legal document such as a lease by the acts of the parties or their own understanding of the document ... As far as our law is concerned, the exclusion of oral by documentary evidence, is governed by sections 91 to 92 of the Evidence Act 1950. Section 91 provides that the contents of a document must be proved by the document itself, and section 92 provides that subject to certain provisos, no evidence of any oral evidence or statement shall be admitted for the purpose of contradicting, varying, adding to, or subtracting from its terms ... evidence of negotiations, or of the parties intentions ... ought not to be received ...

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[17] The Federal Court in *Tindok Besar Estate Sdn Bhd v. Tinjar Co* [1979] 1 LNS 119; [1979] 2 MLJ 229 in explaining the logic behind the rule against the admission of parol evidence in relation to a document said:

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Section 92 specifically excludes evidence to contradict, vary, add to or subtract from any of the terms of a contract in writing, except in any of the situations spelled out in the provisos thereto:

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see, *inter alia*, *Foo Tock Lim v. Piong Liew* [1963] MLJ 67 and *Siah v. Tengku Nong* [1964] MLJ 43F.

... Its contention therefore for the admission of the parol evidence which won the approval of the learned judge was that not all the terms had been incorporated in the agreement. If this contention so generally stated and understand had any foundation at law, then it would be open to any party to a litigation concerning an agreement to say that the agreement which is the subject matter of the dispute did not contain all the terms thereof and seek to introduce such terms or even terms which might not even have been within the contemplation of the other party. No agreement would then be safe from being re-written by one party in a court of law.

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Thus, where the terms of a contract have been reduced to writing, as in the present appeal, and have been proved according to s. 91 that is, the contract is proved by the document itself, it is not open to the appellant to seek to introduce and the court to admit any evidence of any oral agreement or statement that would, *inter alia*, add new terms to it. Such course is clearly prohibited by s. 92 of the Evidence Act 1950.

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[18] The appellant was obviously seeking to re-write the sale and purchase agreement between the parties to add in a new clause or term which says that "time will be extended for payment of the balance purchase price pending the construction of the highways access roads and utilities" which clearly

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- A contradicts the various express terms of the sale and purchase agreement. This is prohibited by ss. 91 and 92 of the Evidence Act 1950 and patently tantamount to re-writing the terms of the sale and purchase agreement and the Federal Court in the above cases had clearly warned against the danger of judicially re-writing such a concluded contract or agreement.
- B [19] The learned trial judge's final reasoning is most telling when His Lordship stated that if there was indeed such oral collateral contract why was it only raised for the first time in the defence and counterclaim dated 27 February 2013 some two years after the so-called oral collateral agreement was supposedly made.
- C [20] We would with respect say that there is not a grain of truth to the appellant's claim of the oral collateral contract. This is because there were indeed letters flying back and forth between the parties including letters sent to the appellant's solicitors but nowhere in any of these letters were there any mention of any such oral collateral contract. In fact during cross-examination
- D DW1 conceded that the alleged oral collateral contract was never raised in any of the contemporaneous correspondences between the parties at the time the respondent was pressing for payment of the balance purchase price. Even after the respondent's letters giving notices of termination, there was still not a whisper of the so-called oral agreement. If such collateral contract existed,
- E the opportune time to bring it up would, logically speaking, be at the point of time when the respondent was pressing for payment of the balance purchase price. In our judgment, the fact that it was never raised at all until the defence and counterclaim were filed can only lead to the irresistible conclusion that there was in fact never any such oral collateral contract as
- F alleged by the appellant. Such allegation is only on afterthought hatched at the time of the defence and counterclaim.
- [21] Accordingly, the learned trial judge was correct in his decision that the appellant had breached the sale and purchase agreement in not making payment of the balance purchase price and that the termination of the same and the forfeiture of the deposit sum by the respondent was valid and lawful.
- G [22] In *Linggi Plantations Ltd v. Jagatheesan* [1971] 1 LNS 66; [1972] 1 MLJ 89, the question for determination was whether a vendor was entitled to forfeit a deposit paid on a contract for the sale of real property following its non-completion by the purchaser though the vendor was not in a position to prove actual damage flowing from the purchaser's breach of contract. The Privy Council held that the contract meant unambiguously that in the event of a failure by the purchaser to complete and notice to terminate being given, the vendor was at liberty to forfeit and to claim for any damage which he had suffered over and above the amount of the deposit (see also *HG Warren v. Tay Say Geok & Ors* [1964] 1 LNS 46; [1965] 1 MLJ 44; *Karuppiah v. Petaling Garden Co Sdn Bhd* [1972] 1 LNS 51; [1972] 1 MLJ 173; *Song Lian*
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Chye & Ors v. Tai Kian Cheong [1983] 2 CLJ 128; [1983] CLJ (Rep) 375; [1983] 2 MLJ 222; *Morello Sdn Bhd v. Jaques (International) Sdn Bhd* [1995] 2 CLJ 23; [1995] 1 MLJ 577; *Invescor Sdn Bhd v. Sobena Maju Sdn Bhd* [2008] 2 CLJ 561; [2008] 2 MLJ 359; and *Koperasi Mahadaya Bhd v. Koperasi Polis Diraja Malaysia Bhd & Anor And Another Appeal* [2012] 1 CLJ 724; [2012] 2 MLJ 569).

[23] Clause 13.1 of the sale and purchase agreement is clear and unambiguous when it stipulates that in the event of the appellant's failure to pay the balance of purchase price by the extended completion date, "the deposit as stated in section 3 of the Second Schedule shall be forfeited absolutely by the vendor ... and thereafter the agreement shall be deemed terminated ...". DW1 during cross-examination, conceded to the correctness and validity of the respondent's termination of the sale and purchase agreement and that the forfeiture of the deposit sum had been rightfully and validly made. He had even agreed to a suggestion that even if time was not of the essence, by 19 December 2011 the termination date, more than a reasonable time had passed for the payment of the balance purchase price.

[24] Having perused the sale and purchase agreement, we cannot help but say that the appellant's alleged oral collateral contract directly contradicts various express terms of the sale and purchase agreements. Apart from cl. 13.1 which has been highlighted above, under cl. 1.2(a) the property is sold on an 'as is where is basis' and under cl. 16.1 the property is sold in its present state and conditions and without the infrastructures and amenities which DW1 had conceded. Clause 3.1(ii) requires the balance purchase price to be paid within the time stipulated in s. 2(c) of the Second Schedule which is three months from the unconditional date or date of the agreement, failing which an extension of one month and another additional two months shall automatically be granted to the appellant by the respondents.

[25] PW1, the supposed other party to the oral collateral contract had vehemently denied it and was also unwavering in his denial of any such thing under cross-examination and had insisted that the lands were sold purely on an 'as is where is basis'. PW2 and PW3 who were present with PW1 during the meetings had also denied any such oral agreement in their witness statements and during cross-examination.

[26] Even DW2, who was also present at the meeting, in his evidence during cross-examination had graciously informed the court that he did not hear the so-called oral agreement. As for DW4, we find that he did not state in his witness statement that he had personally heard PW1 orally agreeing to extend time for payment of the balance purchase price pending the construction of the highway and access roads. Likewise the appellant's solicitor DW3 too did not testify that he had personally heard PW1 orally agreeing to extend time for payment of the balance purchase price pending

A the construction of the highway and access roads. In fact, in his witness statement, DW3 merely said that it was his understanding that there was such an oral agreement.

[27] As much as DW3 was trying to testify in favour of his client, we are satisfied that his testimony does not appear to be in sync with all the contemporaneous documents at the material time. Whilst he claimed that the issue of the infrastructure and utilities were discussed at the very first meeting on 31 January 2011, DW3's very own various initial drafts of the sale and purchase agreements did not mention the infrastructures and utilities until 22 February 2011, the day before the second meeting on 23 February 2011 when the sale and purchase agreements were executed. If the issue was indeed discussed at the first meeting on 31 January 2011, and being such an important matter which pertains to payment of about RM20 million, then surely it would have been inserted in the very first draft of the sale and purchase agreement prepared by DW3 or he, as a competent and experienced solicitor, would have captured it in some documents somewhere, even if it was not reduced into the sale and purchase agreement. This, as DW3 had admitted, was not done.

[28] We would also add that the appellant's letter dated 23 September 2011 seeking an extension of time on the payment of the balance purchase price would not, in our opinion, be necessary if there was indeed the alleged oral contract to extend the time for payment of the balance purchase price. On the other hand, the appellant's solicitors' letter dated 26 May 2011 had requested the appellant to expedite on its application for a loan to finance the purchase of the land as the dateline for the appellant to settle the balance purchase price would fall due on or before 16 June 2011. These two letters clearly contradict the appellant's defence that time was not of the essence or that there was indeed the alleged oral contract.

[29] The appellant in its written submission before us had sought to raise a new point contending that the learned trial judge had wholly failed to consider that the alleged termination of the sale and purchase agreement was invalid as the respondent, having allowed several extensions of time and having in the final notice demanded that the balance purchase price be paid on 30 November 2011 had allowed time to pass for 19 days doing nothing, before purporting to terminate or rescind the sale and purchase agreement on 19 December 2011. The conduct of the respondent, it was contended, had therefore allowed for time to be considered at large, under s. 56(1) of the Contracts Act 1950 and therefore time was no longer the essence of the contract. This, the appellant submitted, resulted in the sale and purchase agreement to be still valid and subsisting.

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[30] In gist, the appellant was now seeking to raise a new point that: **A**

- (a) initially, time was of the essence;
- (b) because of the three extensions of time granted by the respondent, time became no longer of the essence;

(c) from 1 December 2011 to 19 December 2011, time became no longer of the essence; and **B**

- (d) when the letter of termination was issued on 19 December 2011, since time was no longer of the essence, the termination was invalid.

[31] This point was not pleaded in the defence and counterclaim. What was pleaded by the appellant in para. 9.1 of the defence and counterclaim was that time was never the essence of the sale and purchase agreement as there existed an oral agreement culminating into a collateral contract between the parties to extend time for payment of the balance purchase price pending the construction of the highway and access roads to the said property. In para. 9.2 the appellant averred that time for completion and payment of the balance purchase price remained at large under the sale and purchase agreement pending the construction and completion of the highway and access roads to the said property. The appellant also pleaded that when the notice of termination was issued, the highway, access roads and infrastructures were still far from being completed; and so the obligation to make payment of the balance purchase price had not yet arisen and accordingly it was premature for the respondent to have issued the notice of termination, and the respondent was in fundamental breach of contract in issuing such notice. **C**
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[32] We would say that nothing was pleaded in the defence and counterclaim that because of the extension of time and because 19 days had passed, time was no longer of the essence. The new point was also not raised in the appellant's submission and reply submission during the full trial in the court of first instance. In fact, the appellant's then summation of its case was premised on the defence and counterclaim. Neither did the learned trial judge allude to this new point at all because it was not part of the appellant's case at all at the High Court. The learned trial judge had correctly recognised the crux of the appellant's case as being primarily grounded on the alleged oral agreement culminating into a collateral contract and that time was never of the essence from the very beginning, despite the time stipulation in the sale and purchase agreement and the appellant's assertion that time for payment of the balance purchase price was at large. The crux of the matter or the core issue in this suit therefore was whether there existed or otherwise any oral collateral contract as alleged by the appellant. **F**
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[33] We would also mention at this point that the parties had also formulated "Issues To Be Tried" dated 23 July 2013 and this new point was also not part of the said "Issues To Be Tried". The "Issues To Be Tried" were formulated in such a way that the main issue was either the respondents **I**

A had rightfully, validly and lawfully terminated the sale and purchase agreement or there was indeed this oral agreement or collateral contract, and therefore the respondent had repudiated the sale and purchase agreement.

[34] It is thus clear that the new point is indeed a new point and the appellant is clearly attempting to formulate an alternative line of defence which was not pleaded, neither part of the “Issues To Be Tried” nor canvassed or argued during the full trial in the parties respective submissions and replies. It was not a question of law but one of fact and not considered by the learned trial judge in his decision.

C [35] It is trite and established principle that the appellate court tends to lean against allowing issues not pleaded, raised or argued in the court of first instance. In *Lee Ah Chor v. Southern Bank Bhd* [1991] 1 CLJ 667; [1991] CLJ (Rep) 239; [1991] 1 MLJ 428, the Supreme Court held that where a vital issue was not raised in the pleadings it could not be allowed to be argued and to succeed on appeal. It would be manifestly unjust for the appellant to succeed before us on a point not taken before the High Court (see the Federal Court’s decision in *Veronica Lee Ha Ling & Ors v. Maxisegar Sdn Bhd* [2009] 6 CLJ 232; [2011] 2 MLJ 141). It would also be a salutary reminder that it is not the function of this court to make out a case or provide a relief which is not adverted to in the pleadings or new points to be raised and argued on the appeal when those points are not pleaded nor raised in the court below (see the Court of Appeal’s decision in *Osaka Resources Sdn Bhd & Ors v. Foo Holdings Sdn Bhd* [2013] 1 LNS 984; [2014] 1 MLJ 470).

F [36] The importance of pleadings is also well-established in our adversarial system of civil litigation and has found favour with a plethora of cases such as *Hadmor Productions Ltd v. Hamilton* [1983] 1 AC 191 wherein Lord Diplock said:

G Under our adversary system of procedure, for a judge to disregard the rule by which counsel are bound, has the effect of depriving the parties to the action of the benefit of one of the most fundamental rules of natural justice, the right of each to be informed of any point adverse to him that is going to be relied upon by the judge, and to be given the opportunity of stating what his answer to it is ...

Again on the same page the learned judge in dealing with the established exceptions said:

H The present case does not come under any of the established exceptions. The new point to be raised is not one of jurisdiction or illegality. It is also not a mere omission which could be categorised as falling within the realm of technicality.

I In *Tan Tek Seng @ Tan Chee Meng v. Suruhanjaya Perkhidmatan Pendidikan & Anor* [1996] 2 CLJ 771; [1996] 1 MLJ 261 and *Luggage Distributors (M) Sdn Bhd v. Tan Hor Teng & Tan Tien Chi & Anor* [1995] 2 CLJ 713; [1995]

1 MLJ 719 the Court of Appeal acknowledged that the category of cases in which a fresh point may be permitted to be argued is not closed, it depends upon where the justice of a case lies.

[37] Thus, the two clear exceptions to the strict rule are illegality and jurisdiction. The rest, it would appear, depends on where the balance of justice lies. In order to justify the new point to be raised on appeal, it must be shown that the new point comes within the established exceptions (see *Subramanyah AJ Karupiah v. Bank Negara Malaysia* [2011] 2 CLJ 178; [2011] 3 MLJ 454). In the present appeal, the new point was never put to the respondent's witnesses during the full trial at the High Court. The appellant did not lead any evidence on the issue. It was not even raised during cross-examination of PW3, PW4 and PW5 and we would emphasise that the failure to put one's case to his opponent's material witnesses would preclude the former from raising it in his argument. This is trite law (*Subramanyah AJ Karupiah v. Bank Negara Malaysia* [2011] 2 CLJ 178; [2011] 3 MLJ 454; *Aik Ming (M) Sdn Bhd & 8 Ors v. Chang Ching Chuen & 3 Ors & Another Case* [1995] 3 CLJ 639; [1995] 2 MLJ 770; *Browne v. Dunn* (1893) 6 R 67 HL).

[38] We will need to look at the principle in respect of how time may cease to be of the essence. The new point that the appellant was seeking to bring in is that of 'waiver' by which time ceases to be of the essence based on the conduct of parties. In the learned author *Dato' Seri Visu Sinnadurai's Law of Contract*, 4th edn, LexisNexis, 2011, at vol. 2, p. 882, it is stated that 'waiver' may arise 'by express conduct and words and even impliedly by continuing negotiations'. In *Plenitude Holdings Sdn Bhd v. Tan Sri Khoo Teck Puat & Anor* [1992] 4 CLJ 1882; [1992] 3 CLJ (Rep) 281; [1992] 2 MLJ 68, PS Gill J stated at p. 288 (CLJ); p. 79 (MLJ):

But time was no longer of the essence when, as manifested by the conduct of the defendants, it was waived. The correspondence and dealings between the parties down to and including up 12 December 1998 confirms this fact

On appeal, the Supreme Court held that the appellants had waived their rights and time was no longer of the essence of the contract after 3 1/2 years (*Tan Sri Khoo Teck Puat & Anor v. Plenitude Holdings Sdn Bhd* [1993] 2 CLJ 146; [1993] 1 MLJ 113).

[39] Therefore, for this new point, it becomes incumbent upon this court to decide whether on the facts, the respondent had waived time to be of the essence. For this court to so decide, there must be evidence of what had happened in the 19 days between 1 December 2011 to 19 December 2011. However, as the issue was not pleaded, no such evidence was led by either parties. There was not a single shred of evidence of what had happened

- A during those 19 days. The ‘waiver’ cannot arise merely by doing nothing for the 19 days as alleged by the appellant. Silence does not amount to waiver. Mere silence by itself does not at law amount to a waiver of a party’s right to insist that time be of the essence (*Dato’ Seri Visu Sinnadurai’s Law of Contract*, supra at p. 882]. Thus, in *Araprop Development Sdn Bhd v. Leong Chee Kong & Anor* [2008] 1 CLJ 135; [2008] 1 MLJ 783, the Court of Appeal observed:
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Silence by itself could not be interpreted as a waiver. It does not mean anything unless there is additional factor which together with the silence could be interpreted or inferred as a waiver and/or estoppel ... In the present appeal, except for the silence, the respondents did nothing at all ... Silence and time having passed by themselves are not evidence of waiver ... The appellant did not adduce any other evidence which could be constituted as a waiver or estoppel on the part of the respondents.

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- [40] If this new point was pleaded and raised at the High Court stage, the respondents would be afforded an opportunity to adduce rebuttal evidence, and explain why there was a lapse of 19 days from 1 December 2011 to 19 December 2011 and the issue would have been argued thoroughly in the submission during the trial based on such evidence so adduced, and the learned trial judge would then have probably made a decision on this new point, a finding of fact whether there was a waiver and that time was no longer of the essence. It cannot now be said by the appellant that His Lordship had erred on this point when the apparent lapses occurred at the stage of the preparation of the appellant’s pleadings well before the trial commenced. The respondent’s conduct of the case would probably have been different, other evidence could have been adduced, in rebuttal of this new point, had it been raised in the court of first instance.
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[41] In any event, allowing a mere 19 days to pass does not waive time to be of the essence. In *Hock Huat Iron Foundry v. Naga Tembaga Sdn Bhd* [1999] 1 CLJ 89, the Court of Appeal held that inactivity on the part of the defendant between 30 November 1980 to 6 January 1981 (when the defendant agreed to extend the completion date to 31 January 1981) was for so short a duration of time that it was insufficient of itself to make time cease to be of the essence of the contract.

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[42] The appellant has further not shown that the new point fell within any of the established exceptions we have discussed above. The new point raised is obviously not one of jurisdiction or illegality. After taking into account all the relevant considerations, factors for and against the admission of the new point, and based on the foregoing reasons, we are satisfied that the balance of justice lies in favour of the respondent in not allowing the new point to be now raised at the appellate stage.

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Cross Appeal

[43] Learned counsel for the respondent submitted that the appellant had breached cl. 13.2(b) and (c) of the sale and purchase agreement in not removing the private caveat and in not returning the land titles and other relevant documents. The learned trial judge dismissed the respondent's claim for general damages flowing from the lodgement of the private caveat as the respondent had failed to prove the same. We find no reasons to disturb the decision of the learned trial judge on this claim as we are satisfied that the respondent is not entitled to any loss and damages as no evidence was led in the High Court to prove the actual quantum of damages (if any) suffered by the respondent as a result of the appellant's failure to remove the private caveat and return the land title and other relevant documents to the respondent. We therefore dismiss the respondent's cross appeal.

Conclusion

[44] This appeal turns upon a pure question of fact. The learned trial judge had made a finding of fact that the appellant had failed to adduce sufficient evidence to satisfy the burden of proving the existence of the alleged oral collateral contract. His Lordship had also found that, as a matter of fact, the appellant had breached the sale and purchase agreement in not making payment of the balance purchase price within the extended time granted by the respondent and that accordingly the termination of the agreement as well as the forfeiture of the deposit sum pursuant to the letter dated 19 December 2011 were valid and lawful. For the reasons discussed above, we are satisfied that the learned trial judge had not fallen into error or fundamentally misdirected himself in law or on the facts in coming to the conclusion as he did. There are no reasons for this court to interfere with the findings of fact arrived at by the court of first instance. Based on the foregoing reasons and discussion, we dismissed the appeal with costs. Our decision in this appeal applies equally to Civil Appeal No. W-02(NCVC)(W)-1846-10-2014 which is also dismissed with costs. We fix costs at RM30,000 to be paid to the respondents in both the appeals. The deposits shall be returned to the appellant.

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